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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

P. H. KIRWAN, AS UNITED STATES SURVEYOR-GENERAL for the district of Minnesota, and THOMAS H. CROSWELL, appellants,

v.

SIMON J. MURPHY, GEORGE O. ROBINSON, Elisha A. Flinn, and Temple E. Derr, appellees.

No. 161.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANTS.

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STATEMENT.

This suit arose upon a bill of complaint filed in the United States circuit court, district of Minnesota, by appellees, claiming to own certain lands in sections 2, 3, 4, 9, 10, 11, in township 57 north, range 17 west, fourth principal meridian, Minnesota, against appellants, the United States surveyor-general, district of Minnesota, and a deputy surveyor, to enjoin them from surveying, by direction of the Commissioner of the General Land Office, said lands, claimed by the land department to be unsurveyed public lands of the United States.

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June, 1876, Deputy Surveyor Howe, under a contract for survey of this township, made return of a survey whereby these sections were returned as containing Cedar Island Lake, its meanders and the abutting lands being returned as shown in the printed record, page 15, the lake covering about 1,800 acres. The lake was in fact of about 1,202 acres less extent, lying within Howe's meander line, as shown on plat "A" annexed to Exhibit C (Record, pp. 22 and 143). The real body of water touched the meander line at but three points, all on the north shore of the lake, two of which are upon the north township line. In 1892 the United States surveyor-general for Minnesota, on petition of settlers, recommended a resurvey of the township. This was opposed by those claiming to own the lands abutting on the Howe meander line. There was a hearing, and the contest ended in an order and contract for a survey.

Thereupon appellees filed their bill (Record, p. 1), alleging that they owned lots 1, 2, 3, section 2; 1, 2, section 3; 1, 8, and parts of 6 and 7, section 4, and certain described parts of sections 9, 10, and 11 in this township, deriving title through mesne conveyances and patents from the Government; that the land was surveyed in June, 1876, and the record of survey and field notes were approved by the United States surveyor-general, August 7, 1876, and a plat therefrom was by him duly made and submitted to the Commissioner of the General Land Office; that complaint was filed against the accuracy and good faith of the survey,

which the Commissioner dismissed, and June 11, 1879, approved the survey and plat, which were duly filed, and are the only survey and plat of that township ever made or adopted by the Government, and upon them the Government sold and disposed of all the land in the township; that the survey, field notes, and plat made therefrom were inaccurate and do not correctly show the location and subdivisions of land and water in the township, for that Cedar Island Lake, a boundary of parts of complainants' lands, is smaller and several of complainants' fractional lots are larger and others are smaller than shown on the plat (record, p. 8); that complainants purchased said lands for value as extending to the lake upon an estimate of the timber thereon, without knowledge of inaccuracy or fraud in the survey; that the consideration inducing such purchase was that the land bordered the lake, and they owned other timbered lands the timber from which could be brought to market by floating through the lake and its outlet through the St. Louis River, then the only means of transport; that in 1892 certain intrusive settlers, knowing complainants' right and claim, petitioned for the survey of said lands, and that an order and contract therefor had been made, and the survey was about to commence. The bill then avers, as the only grounds of equity jurisdiction (record, p. 11):

> That by a new survey of said lands your orators will be put to great and vexatious litigation in making proof of their title in actions against parties who are wholly irresponsible.

That a very large amount of the timber standing as aforesaid on the land of your orators and owned by them will be destroyed in the making of such proposed survey and the remainder thereof exposed to damage by fire by reason of said resurvey and your orators will be thereby irreparably injured.

The prayer (record, p. 13) was that the—

surveyor-general, his agents, attorneys, solicitors, and servants may be restrained by the order and injunction of this honorable court from entering into any contract for the survey of the lands herein described, or from surveying the same, or from taking any action for a survey of said lands or any part thereof, and that boundaries of said lands of your orators may be defined and set out in the decree and order of this honorable court and that all necessary direction may be given them for that purpose and to establish the boundaries of said lands and that your orators may be protected in the use and enjoyment of such lands so owned by them as aforesaid extending to and including the shores of said Cedar Island Lake and to the center of said lake, and that said defendant and his successors in office may be perpetually enjoined from letting said contract for the survey of said land or any part thereof, and from surveying the same or any part thereof, and that your orators may have such other and further relief as to this court may seem meet.

The appellants answered (Record, p. 36) admitting the making of a contract for survey of the unsurveyed

lands in these sections lying between Howe's purported meander line and Cedar Island Lake; that in 1876 a contract was made with one Howe for survey of the township, and that he returned the field notes of a pretended survey, from which a plat was made and approved, but averring that Howe surveyed only the exterior lines of the township, and in fact made no subdivision thereof or survey of the lands within it; that his field notes were false, fraudulent, and fictitious, and the plat made therefrom was false and incorrect; admitting that the survey and plat were approved by the Commissioner of the General Land Office after complaint to him of its inaccuracy, but not until after withdrawal of the charge of inaccuracy by the person making it; admitting that Exhibit A (Record, p. 15) is a true copy of such approved plat; denying that all of said lands were disposed of by the Government, and alleging that about 1,200 acres of land in these sections were never disposed of and are still unsurveyed, lying between Cedar Island Lake and the lots described, all of which unsurveyed land is the land referred to and is, by the plat (Exhibit A) made from Howe's field notes, indicated as part of Cedar Island Lake; alleging that no lots conveyed to plaintiffs are smaller than shown on the plat; that the true relative size and contour of the lake to that shown on the plat is shown on Exhibit B (Record, p. 71), and the land between the lake and the boundary line (Howe's meander) of the fractional lots is the 1,200 acres of unsurveyed Government land referred

to; denies the good faith of complainants' purchase; alleges complainants' full participation in the contest proceedings resulting in the decision (20 Land Decisions, 28) and order for survey of these lands, and that the Commissioner and Secretary of the Interior had full jurisdiction to pass upon the question and to make the decision and order. The answer denies that timber on complainants' land will be destroyed or damaged in making such survey, and denies every averment of the bill, except as in the answer averred or denied.

Upon the issues formed trial was had in the circuit court, which (Record, pp. 331–333) found:

> 1. On or about April 26, 1876, a contract for the survey of all lands in township 57 north, of range 17 west, in Saint Louis County, Minn., was made by the Government of the United States with one Henry S. Howe, as a deputy surveyor of the United States, and thereafter said Howe made and filed what purported to be field notes of a survey of said township, from which a purported official plat of said township was thereafter made and approved by the surveyor-general of the United States for the district of Minnesota and by the Commissioner of the General Land Office, of which plat Exhibit A attached to the bill of complaint is a substantially correct copy.
>
> 2. *There is no evidence, nor any marks upon the ground, to indicate that any actual survey of said township 57 was ever made by said Howe, as required by his said contract, and by the rules and regulations of the General Land Office, or at all,*

beyond the running and due marking of the exterior boundary lines of said township, where the section, quarter, and other posts and markings established by him are and always have been clear, distinct, and readily found and traced. There is no evidence on the ground that section lines were ever run by him in or across said township, or section corner posts or quarter posts ever located or set by him, except a corner post at the northwest corner of section thirty-six (36) and a quarter post in the western line of said section thirty-six (36), and there is no evidence that witness trees were ever blazed or marked by him.

3. *Cedar Island Lake is a navigable, deep, and permanent body of water, fed principally by springs, having an area of about nine hundred (900) acres, instead of about eighteen hundred (1,800) acres, as described in the field notes of Howe and shown on said official plat of said township. Instead of the shores of said lake being low and swampy, as stated in said field notes, the banks are generally high and sloping lands, suitable for agriculture, extending around the lake, and support a good growth of pine and other forest trees large enough for lumbering, such as will not grow in water.* The condition was the same in 1876, and no material part of the land surrounding the lake is accretion. Southerly and westerly of said Cedar Island Lake are five other deep, navigable, and permanent lakes in the same township, none of which are shown by the field notes of Howe's survey or upon said Government official plat of said township, and all of which have, since the making of said official

plat, been sold and patented by the Government as land according to said plat.

4. *There is no evidence upon the ground that any meander line of said Cedar Island Lake was ever surveyed by said Howe, or any meander posts placed by him about said lake, except one where the north line of said township encounters said lake. And the outlet of said lake is at a different place from that described in said field notes and shown upon said official plat.* After the making of the said survey and plat, and before its approval, complaints touching the accuracy thereof were made to the Commissioner of the General Land Office, but on the withdrawal of such complaints, the said survey and plat were approved.

5. The land lying between the actual water line of said Cedar Island Lake and the meander line of that lake, as delineated on said official plat of said township, comprises the land in controversy in this suit, and is the same land directed to be surveyed by the Commissioner of the General Land Office and referred to in the surveyor's contract, being therein described as "the public lands situate in sections 2, 3, 4, 9, 10, and 11, in township No. 57 north, R. 17 west, of the fourth principal meridian, lying between the 'old meander boundary of Cedar Island Lake,' as given by the original field notes of Henry S. Howe, United States deputy surveyor, approved by the surveyor-general of Minnesota August 19, 1876, and the shore line of said Cedar Island Lake."

6. Prior to the commencement of this suit the United States has sold, and by its patents

has conveyed, to the purchasers, according to said official plat made from said Howe survey, all the land in said township 57, as the same appeared upon said plat; to which plat all of said patents expressly referred, it being then and still the only Government plat of said township.

7. The complainants are the grantees and owners by mesne conveyances from the patentees of the record title to the following-described fractional lots in said township, to wit: Lots one (1), two (2), three (3), in section two (2); lots one (1) and two (2), in section three (3); lots one (1) and eight (8), and portions of lots three (3), five (5), and six (6), in section four (4); lots one (1), two (2), three (3), and four (4), in section nine (9); lots one (1), two (2), three (3), and four (4), in section ten (10); and lot three (3), in section eleven (11), being the same lands which are more particularly described in complainants' bill; and each of which fractional lots appear and are represented on said official plat as bounded by and upon said Cedar Island Lake.

8. So far as appears, none of the patentees of said lands had any notice or knowledge of any fraud or misconduct on the part of said Howe in or about the making of said survey and field notes, and all were purchasers in good faith of said lands.

9. Complainants purchased said fractional lots of land of the patentees of their grantees for the pine timber thereon, and the convenience of landing the same in the said Cedar Island Lake, to be driven to the place of manufacture; *and before such purchase in the year 1883, caused said*

lands to be explored and examined by an experienced timber estimator, who in making such examination, as is customary in such cases, used a copy of said official plat of said township which did not have upon it any statement of the acreage or amount of land in any of the subdivisions; and who reported to the complainants his estimate of the amount of pine timber on said lands, and the general character of said land, and the riparian character thereof as bounded upon said Cedar Island Lake; but did not discover or report any fraud or error in the survey of said township, or any error or mistake in the said official plat. And the said complainants purchased, paid for and took conveyances of said lands in good faith, and without any notice or knowledge of any such fraud, error, or mistake.

The court, after description of the lands (Record, p. 339), decreed:

* * * and that said above-described fractional lots extend to and are bounded by and upon the actual waters of Cedar Island Lake.

It is further ordered, adjudged, and decreed that the defendants have no jurisdiction or authority to meddle with said lands or to make the survey complained of in the bill of complaint herein; and

It is further ordered, adjudged, and decreed that the injunction heretofore issued in this cause be, and the same is hereby, made perpetual, and that the said defendants and their successors, representatives, and assigns be, and they are hereby, severally and perpetually restrained and enjoined from surveying or caus-

ing to be surveyed the lands hereinbefore described, or any part thereof.

This decree was, upon appeal, affirmed by the circuit court of appeals, eighth circuit (Record, p. 348), and the case is brought to this court by further appeal (Record, p. 348).

QUESTIONS PRESENTED.

The questions presented upon the record are:

1. The power of the Land Department to make the proposed survey, it being a conceded and ascertained fact that the interior of the township was never surveyed; and to what extent is the Government bound by the fraud or intentional violation of law by its surveyor.

2. The boundary of the fractional lots specified in the bill, or the effect of the plat and of the Federal statutes regulating surveys of the public lands in view of the facts.

3. The effect of fraud or mistake in a survey upon subsequent purchasers from patentees.

4. Whether complainants are not upon the facts chargeable with notice of fraud in the survey and inaccuracy of the plat.

5. The effect of the decision of the Land Department upon the contest as *res adjudicata* upon the facts.

6. The jurisdiction of the circuit court in equity to entertain the bill and give the relief granted by the decree.

7. The power of the court to control the action of the officers of the Land Department.

SPECIFICATION OF ERRORS.

The court erred:

First. In holding that the circuit court had jurisdiction to restrain appellants from making a survey of said lands, which, as shown by the record, are unsurveyed public lands of the United States.

Second. In not reversing the decree of the circuit court, and not directing a dismissal of the bill, for the reason that it affirmatively appears from the admitted and established facts in the record that appellees have never had any right, title, or interest in the lands proposed to be surveyed, and were not entitled to any relief.

Third. In holding that the United States had made no attempt to correct its survey of said lands and had given no warning that it claimed the survey to be erroneous until after appellees had purchased of its patentees for full value, in reliance on the survey and plat, for the reason that it appears from the record that no survey of said lands was ever made, of which fact said purchasers had full knowledge and actual notice.

Fourth. In affirming the decree of the circuit court, for the reason that said court had no jurisdiction to enjoin a survey of said land as ordered by the Interior Department of the Government of the United States, which has sole charge of the public land of which the lands in question are a part.

Fifth. In holding it is now too late for the Government to correct said survey, for the reason that no survey of said lands was ever made, and laches are not

imputable to the Government in the survey of its public lands.

Sixth. In not reversing said decree, and not directing a dismissal of the bill, for the reason that said suit is in substance and effect a suit against the United States for specific performance of a fraudulent representation of a subordinate officer, whose fraud does not conclude the Government, and the United States has not consented to be sued in such case.

Seventh. In affirming the decree of the circuit court, for the reason that no equity was alleged in the bill of complaint, because if appellees own said lands, as claimed,

(1) They have adequate remedy at law;

(2) No liability to irreparable injury is shown;

(3) Nor continuing trespass or nuisance;

(4) Multiplicity of suits will not be prevented;

(5) The adverse claimants, settlers on said lands, are not made parties to the bill, and a decree in the suit will not conclude them or quiet title;

(6) Appellees and their grantors, before their purchase, had full knowledge and notice that no survey had been made, and did not purchase in good faith.

Eighth. In not reversing said decree, and in not holding that for all purposes of administration appellees were concluded by the contest proceeding, resulting in the order for survey of the lands.

POINTS AND ARGUMENT.

Definition of Controversy. Question of Boundary, not of Riparian Right.

Preliminary to discussion, we insist that the case involves a question of boundary only, and presents no question of riparian right. It is a singular feature of the case that heretofore counsel in argument, and the courts in the decrees and opinions, have failed to recognize the broad and established distinction that exists between the effect of a true meander line actually run approximately along a body of water or other obstruction found in an actual survey, and a false or fictitious meander line, which for fraud or mistake is a mere random line and false call, and does not delimit or have approximate contiguity to any body of water, reservation, or obstruction found in the survey.

Riparian rights are those rights which arise to a riparian proprietor by virtue of his title and ownership of the shore. They are incident to the ownership of the shore itself, and have no existence but as an incident to such ownership. Among riparian rights are those to accretion and to right of access to the water, and it is fundamental that one claiming riparian right must first show that he owns the shore. *Bates* v. *Illinois Central R. R. Co.* (1 Black., 204, 208); *Niles* v. *Cedar Point Club* (175 U. S., 300, 308); *Lamprey* v. *State* (52 Minn., 198); *Grant* v. *Hemphill* (192 Ia., 218).

The question here is not of rights incidental to an ownership of the shore, but whether appellees are

owners of the shore or are owners only of those tracts bounded by a line laid at random on a plat and purporting to delimit a lake, but which in fact was never run, and which if run where it purported to have been run would not approximately delimit the lake, but would lie three-fourths of a mile or more from the lake over what then and ever since was high, agricultural land, clothed with ancient trees which could not have grown in water. The question, then, is one of boundary simply. It is not disputed that appellees, by their patents, own the fractional lots. The dispute is where those lots terminate—*i. e.*, what is the boundary of appellees' lands.

The power of the Land Department to dispose of the public lands does not arise under the public-land laws until a survey of the lands committed to its administration.

In every act for the disposal of public lands the first step provided to be taken is for their survey for ascertainment of their character and definite subdivision, and ascertainment of areas embraced in them. The land laws generally limit the quantity that can be taken by one individual, or under an entry, and value is fixed according to area, so that a survey is essential to administration of the land laws. Ordinarily lands not surveyed are not subject to disposal. A survey was indispensable under the laws under which appellees claim (sections 2266, 2289, 2354, 2355, and 2415 Rev. Stat.; sec. 3 act May 14, 1880, 21 Stat., 140), and they rest their claim wholly upon Howe's pretended survey.

In *Horne* v. *Smith* (159 U. S., 40, 44), a meander was actually run along a bayou falsely indicated upon the field notes and plat as "Indian River," and the land lying between the bayou and river was left actually unsurveyed. Responding to a claim that a lot bordering on the meandered line should be deemed to extend to the river, the court in that case said:

> * * * It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyors thought that the action of the water would soon wash the low land away; but whatever the reason, the *fact is obvious that no survey was made* of that body of land, and *the boundary line fixed* was the water line of the bayou.
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> * * * * *
>
> [p 45.] *The patent conveys only the land which is surveyed*, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it. [Citing *Lammers* v. *Nissen*, 4 Nebraska, 245.] In that case it appeared that between the meander line as run and the Missouri River was a tract of several hundred acres, and the court held that as that body of land had not been surveyed it did not pass by a patent of a lot which on the Government plat extended to the meander line. A similar ruling was made in *Glenn* v. *Jeffrey* (75 Iowa, 20).

The rights of a claimant to public lands are measured by the law upon which his claim is founded.

Rector v. *Ashley* (6 Wall., 142); *Frisbie* v. *Whitney* (9 Wall., 187, 197).

It was held in *Wilcox* v. *Jackson* (13 Pet., 498, 517) that:

> * * * whenever the question in any court, State or Federal, is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States.

As the law provides a survey precedent to disposal of lands, one can not claim land never surveyed.

But it is insisted that because there was an approved plat purporting to be based upon a survey, the patent issued making reference to such plat has the effect to convey all existing land to the call for the natural object, Cedar Island Lake, mentioned in the fictitious field notes and shown upon the plat, regardless of the other calls of course and distance. The theory of the bill is that the Government is, by the false representation of the fictitious survey and plat, estopped to deny that the lake is the boundary of its grant. The prayer of the bill is that the court by decree—

> * * * establish the boundaries of said lands and that your orators may be protected in the use and enjoyment of such lands so owned by them as aforesaid *extending to and including the shores of said Cedar Island Lake and to the center of said lake.*

This presents the question of the office and purpose of the survey and plat and the power of the surveyor under the law governing him to conclude the Government by his fraud or manifest mistake.

The law regulating surveys of public lands and the natural features of the ground negative complainants' contention, control the surveyor and the Land Department, and so limit the survey, plat, and grant here in question as to make the fictitious meander line a boundary.

(1) The manner of making surveys of public lands is specified by sections 2395, 2396, and 2397 of the United States Revised Statutes. Section 2395 provides for the survey of the public lands into townships of 6 miles square by lines according to the true meridian and others at right angles thereto. Except only where navigable rivers or reservations make this impracticable can the President change this method. The township is to be subdivided into 36 sections of 1 mile square by lines parallel to the township boundaries, each of these lines to be plainly marked upon trees, and the section corner at the end of every mile to be numbered and marked on a tree near thereto with the section and township number. The surveyor must note in his field book the true situation of all "mines, salt licks, salt springs, mill seats," and "water courses," and quality of the lands. This book is returned to the surveyor-general, who from it makes and transmits a plat to the officers who superintend the sales, "describing the subdivisions thereof, and the marks at the corners."

Sections 2396 and 2397 then provide:

> SEC. 2396. The boundaries and contents of the several sections, half sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners, which stand on the same line.

Second. The boundary lines actually run and marked in the surveys returned by the surveyor-general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the surveyor-general, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered

as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

SEC. 2397. In every case of the division of a quarter section the line for the division thereof shall run north and south, and the corners and contents of half quarter sections which may thereafter be sold shall be ascertained in the manner and on the principles directed and prescribed by the section preceding, and fractional sections containing one hundred and sixty acres or upwards shall in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Interior, and in every case of a division of a half quarter section the line for the division thereof shall run east and west, and the corners and contents of quarter quarter sections, which may thereafter be sold, shall be ascertained as nearly as may be in the manner and on the principles directed and prescribed by the section preceding; and fractional sections containing fewer or more than one hundred and sixty acres shall in like manner, as nearly as may be practicable, be subdivided into quarter quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Interior.

The minute and careful provisions of this statute show an intention to fix uniform and definite rules by which the form and boundaries of tracts of land should be made certain. No reference is made to natural monuments, nor are they recognized as having any force. The act requires artificial monuments to be

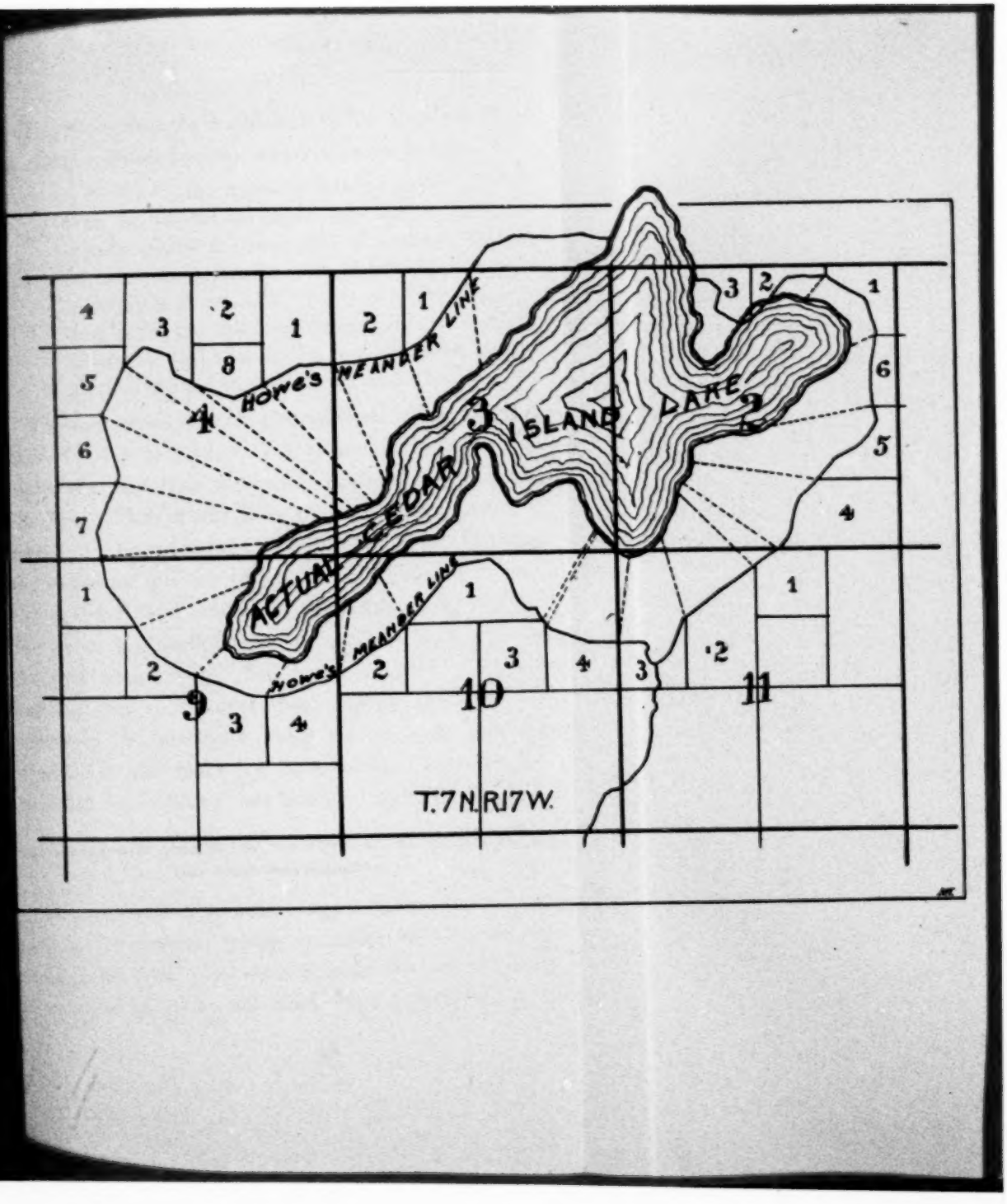
made by the surveyor at uniform distances, on courses of fixed direction, for the very purpose of uniformity, fixing and controlling tract boundaries. Officers who dispose of and persons who enter public lands are conclusively presumed to act with knowledge of the law. The only intent that the purchaser can be heard to assert is that he expected to receive that tract which has been or will be ascertained to be his upon a survey in compliance with this statute. The law is a part of the contract. There is no room under this system for rules of construction to ascertain the intent of the parties, as might arise upon sales under an irregular system of surveys, having no fixed general courses and distances.

It is demonstrable that the lots in the case at bar can not be extended to the lake by straight lines. If the lines of lots 3, 5, and 6 be extended by straight lines they would never reach the lake, and by such extension the lots would overlap each other. The lines of lot 1, the east line of lot 8, and south line of lot 7 extended would reach the lake, but the west line of 8 and north line of 7 would not. To satisfy appellees' contention, the prayer of the bill, and the decree of the court, the lines must be deflected and extended radially to the lake, the west line of lot 3 being deflected, approximately, forty-five degrees from its course, and other lines proportionately, as illustrated below.

It must be noted that there is no statutory requirement for the recognition of streams or bodies of water as controlling calls of the survey, but, on the contrary,

boundary lines not actually run and marked shall be ascertained by "straight lines" run from "established corners" east and west and north and south. The meanders and calls for bodies of water, streams, or other natural monuments not marked as corners can not be held to be controlling calls, superseding both course and distance, if, as in this case, they overturn the primary object of the statute—a rectangular division of lands by lines run to the cardinal points from the true meridian. The prayer of the bill and decree rendered produce in section 4 a result subversive of the cardinal and controlling system fixed by statute, which result is illustrated by the drawing here inserted.

In the face of the statute it can not be rationally presumed that the Government intended to convey, or that the patentees of lots 1, 8, 3, 5, 6, 7 expected to receive, or supposed that they were making entry for any such absurdly formed bodies of land as result by extending the lines of these fractional lots radially to the lake; or that fractional lot 1 in the northeast of section 4, and lots in the north half of section 10, should extend into section 3, and lots 4 and 5 in section 2, and those in the north part of section 11 should be extended to the lake across the southwest quarter of section 2, as would be necessary for them to border upon the lake. Had Howe made and returned such a survey, it must have been disapproved. Because he did not make it, and returned a fictitious one, the court is asked to give his failure to act the effect of a survey that must necessarily have been immediately disapproved by the land department, had it been so made and returned.


HOWE'S MEANDER LINE
ISLAND LAKE
CEDAR
ACTUAL
HOWE'S MEANDER LINE
T.7N.R17W.

The circumstances in the case at bar are like those in *Horne* v. *Smith* (*supra*), wherein the court said:

> * * * the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line * * * is * * * in sections 22 and 27 * * * The description in the patents is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.

The contention here, in like manner, is that the east line of lot 1 in section 4 shall be extended southeasterly to the lake to include lands in section 3 and the lines of lots 2 and 3 in the southwest quarter of section 11 be extended to the lake, including lands in the southwest quarter of section 2, which is contrary to the above clear holding of the court. The requirement that the surveyor "shall note in his field book the true situation of" "all water courses" does not indicate that the Government intended thereby to supersede the statutory rules for ascertainment of boundaries and make the fictitious field notes conclusive that the fractional lots bounded upon the lake.

Surveyor's acts outside or violative of his authority do not bind Government.

The surveyor is a public agent whose powers are defined by statute, which is notice to all claiming through his acts. His acts, outside his authority and in violation of it, do not bind the Government. As

said in *Whiteside et al.* v. *United States* (93 U. S., 247, 257):

> Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. (*Mayor* v. *Eschback*, 17 Md., 282.)
>
> Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

As to officers of the land department, it was held in *Moffat* v. *United States* (112 U. S., 24, 31) that:

> * * * The Government does not guarantee the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but the servants of the law, and if they depart from its requirements the Government is not bound. * * *

No estoppel here. Courts can not make or correct surveys of public lands.

The court, under the guise of an estoppel, is here asked to decree and establish a survey violative of an express statute. When stripped to the red, the proposition becomes an absurdity. There is no such magic in an estoppel as to authorize a court to decree the violation of a statute. The courts have no jurisdiction to decree the correction of a survey. (*Cragin* v. *Powell*, 128 U. S., 691, 697.) Much less can they by decree give effect to a survey never made, and which, if made, would be violative of express statute law.

An estoppel can be no broader that the representation upon which it arises. The effect of an estoppel is to prevent the party from showing the truth. An estoppel must be mutual, certain as to every intent, and can not be extended by mere argument or inference. Except as it has granted lands to *bona fide* purchasers according to the plat made from the fictitious survey, the Government is not bound by the plat or representation of a survey. As to the parts of the township outside the representation of lines of survey, the Government is not bound.

Outside those lines, regarded as "established" lines, there is no representation that a survey was made. Those lines represent that the survey terminated there, and that whatever lay outside those fictitious lines of meander was unsurveyed. There was no representation that the land lying outside the meander, between it and the lake, was part of the fractional lots, but that it was not a part of the lots and was not sold and did

not pass by the patent. The lake not lying there, the representation of a meander became the boundary line of the lots.

In *Brown's Lessee* v. *Clements* (3 How., 650) the court held that, under the act of April 24, 1820 (codified as Revised Statutes, sections 2395–2397), it is the duty of the surveyor to so lay out a fractional section as that an entire quarter section may be had if the fraction admits of it, and that the local office has no authority to sell by a plat disregarding the requirement. Later, in *Gazzam* v. *Phillips* (20 How., 372), with reference to the same irregular survey, the court was constrained by a usage of twenty-eight years, and by regard to rights arising under it, to overrule that decision so far as it affected fractional sections, but no cases adjudged since the act of 1820, *supra*, have permitted the extension of fractional tracts into another section, beyond the extended lines of the fractional section, as results in the present case.

Where no meander was actually run, or where the meander does not approximately indicate the water line, the meander becomes a boundary.

The court has not been frequently required to determine the effect of the statute regulating surveys as bearing upon and controlling the general rule that calls for natural monuments, as bodies of water, control courses and distances, but in such cases as the court has made reference to the matter, the clear intimation has been that this rule must yield to the statute. In *Horne* v. *Smith* (159 U. S., 40), as before stated, a

meander was actually run along a bayou falsely indicated upon the field notes as "Indian River." It was claimed that the fractional lot must be extended to the river. The court held (pp. 43, 44):

> * * * In the first place, the area of the lots is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.
>
> * * * * *
>
> It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyors thought that the action of the water would soon wash the low land away; but whatever the reason the fact is obvious that no survey was made of that body of land, and the boundary line fixed was the water line of the bayou [i. e., the meander line].

Again, in *Niles* v. *Cedar Point Club* (175 U. S., 300), the meander line was run through a marsh, so indicated by the field notes, but it was contended that the true boundary was the lake. The court discussed the statutes (p. 306) and held:

> It may be that Surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the Government was offering for sale.
>
> It may be true that under his contract, the requirements of the statute, and the regulations of the Land Department, Rice should have extended his surveys to the shores of Lake Erie, but he did not do it; he stopped at the borders of this marsh, and the Land Department in effect approved his action. He evidently thought that the marsh was to be treated as a body of water, a conclusion not unwarranted in view of the finding of excessive high water at that time, but a conclusion which other findings show was not correct. And it may be remarked in passing that the letter of the statute would not limit the surveys to the shores of the lake, for section 2395 Revised Statutes declares that surveys shall be by running lines at

right angles "so as to form townships of 6 miles square, unless where the line of an Indian reservation or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require."

* * * It is true section 2396, which provides how the boundaries and contents of the several sections, half sections, and quarter sections of the public lands of the United States shall be ascertained, says, after stating the rule where all the corners are established, that "in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."

If this recognizes any other external boundary than that which is indicated in section 2395, it does not prescribe what that external boundary shall be; and if the land department treats either a marsh or a lake as such external boundary, who can declare that its action is void?

* * * * *

(p. 308) But it is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or nonnavigable, and that

> therefore the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was "flag marsh," or "impassable marsh and water." But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or Indian reservation.

The court had previously intimated the effect of a mistaken or fraudulent meander line, and in *Mitchell* v. *Smale* (140 U. S., 406, 413) said:

> We do not mean to say that in running a pretended meander line the surveyor may not make a plain and obvious mistake or be guilty of a palpable fraud; in which case the Government would have the right to recall the survey and have it corrected by the courts or in some other way. Cases have happened in which by mistake the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government.

The recent expression of the court in *French-Glenn Live Stock Company* v. *Springer* (185 U. S., 47) was upon a case in many respects like the present in that the meander line was far distant from the actual body of water and the fractional lots could only reach the actual water line by deflected radial extension of their

side lines. It was different from the present case in that a meander line was actually run, and the field notes described it as passing through a "tule marsh." The court held (pp. 51–52):

> * * * We agree with the supreme court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake thus laid bare to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. If, indeed, there had been a lake in front of these lots at the time of the survey, which lake had subsequently receded from the platted meander line, the claim of the owner of the lots to the increment thus occasioned might be conceded to be good if such were the law of the State in which the lands were situated. But if there never was such a lake—*no water forming an actual and visible boundary—on the north end of the lots*, it would seem unreasonable either to prolong the side lines of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake. * * *

The cases of *Horne* v. *Smith* and *French-Glenn Live Stock Co.* v. *Springer*, above cited, were decided upon facts so nearly parallel to those in that at bar that those decisions seem conclusive here. The defense in the present case, presented by appellants, is the stronger, and differs from those mentioned as parallel and controling, in that, in the present case, no meander line

was in fact run, no survey was in fact made, and no body of water in fact existed at or near the line falsely indicated, as was the fact in *Horne* v. *Smith*.

The foregoing cited cases might well be relied upon as showing that a false meander line, whether run or not, will not operate to extend the boundaries of fractional tracts indefinitely to reach the natural object called for. But expressions of this and other courts in instances not presenting the great departure from the statutory rule for surveys that is here contended for by the appellees, used in cases where the meander was actually run in good faith, give such semblance of foundation for that contention that the decision of inferior Federal and State courts will also be considered.

The general rule of this and of other courts is that where a meander line is in fact run approximately along the water boundary, though excluding points of land, the water and not the meander line is the true boundary. But this rule does not apply where no meander was made or where the meander does not approximately indicate the water line.

In *Granger* v. *Swart* (1 Woolw., 88, 90) Justice Miller, in his charge to the jury, laid down the rule that:

> The patents and deeds under which the defendant claims do not pass the title to the premises in question, unless, at the date of the entries on which they issued, the Rock River, where it is called a river, and Lake Koshkonong, where it is called a lake, extended to and bordered upon the meandered line which constitutes the boundary of the lands described in the

patents. In other words, if, between the meandered line, which by the Government survey was made one of the boundaries of the land sold to Walker, and the bank of Rock River and shore of Lake Koshkonong, there was at that time a body of swamp, or waste land, or flats, on which timber and grass grew, and horses and cattle could feed, and hay be cut, then the patents to Walker did not cover this land, but were confined to the actual limit of said meandered line.

In *Lammers* v. *Nissen* (4 Nebr., 245–251), affirmed by this court (154 U. S., 650), the Nebraska court held that:

> The mere fact that it [a line] is run and designated upon the plats as a meander line certainly *can not be conclusive* in the matter. To establish the doctrine that such meander line is conclusive would be to estop the Government from disposing of land left unsurveyed between such line and the bank of the stream; it would prevent the correction of mistakes made by surveyors in such case and would be in direct conflict with the well-settled rule of law defining what is an accretion to land.

This decision is by that court cited and adhered to in its later decisions in *Bissel* v. *Fletcher* (19 Nebraska, 725, 727; 28 N. W., 303), and *Harrison* v. *Stipes* (34 Nebraska, 431, 433; 51 N. W., 976), and the decision is cited by this court in *Horne* v. *Smith* (*supra*)

In *James* v. *Howell* (41 O. St., 696, 709) the court held the same doctrine. This decision was cited by this court in *Niles* v. *Cedar Point Club* (175 U. S., 306).

Glenn v. *Jeffrey* (75 Ia., 20) arose upon a case similar to *Horne* v. *Smith* (*supra*), the field notes of survey calling for the Missouri River, but in fact reaching only to a bayou some distance short of the river. The court (p. 21) held:

> There was no controversy as to the facts. It is true that the Government plat and field notes described the meander line as being at the Missouri River, and therefore it is claimed that lot 3 extended to the river. In fact, however, instead of running the meander line along the river it was run along a bayou some distance from the river. The land in question can not be regarded as accretion, but existed, as it now does, when the survey was made. The court rightly directed the jury to find for the defendant. *The land never was in fact surveyed* by the Government, and never sold or conveyed to the plaintiff.

Later that court had before it a case substantially identical with this and the French-Glenn case, *supra*. It was a case of false meander. There was no water body at or near to the place indicated in the field notes of survey. The plaintiff being owner of land bounding the false meander line, brought action to quiet title against one occupying the tract in question, claiming as a homestead settler, and that the tract was unsurveyed public land. Of the plaintiff's claim of ownership the court, in *Grant* v. *Hemphill* (92 Ia., 218, 223), held:

> It is a claim of ownership because he is the owner of the adjoining land. If his ownership

on this ground is well founded he is entitled to a decree quieting his title; if he has no title to the land he has no more right to the possession than the defendants. In other words, if the land in dispute is not owned by the plaintiff, and is not surveyed, and can not be sold or disposed of until it is surveyed, it is part of the public domain, to which no one can acquire either ownership or right of possession. * * *

We come now to the material question in the case. A section of land is supposed to contain 640 acres. If section 19 had been all surveyed, it would have embraced a less number of acres, being what is known as fractional. As we have said, the five lots owned by the plaintiff contain 221.36 acres, and the west half of the northwest quarter is marked on the plat of the Government survey as containing 58.93 acres. If the section were not fractional, the plaintiff's claim would be a demand for a decree quieting title in him to more than 360 acres of land based on the ground that he is the owner of 222 acres of land adjoining, of which he is a riparian proprietor, and he makes this demand in a court of equity. A riparian proprietor is one who owns land bounded upon a water course or lake. The evidence in this case shows that there was not at the time of the Government survey, and is not now, any body of water east of the meandered line on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. In the large mass of authority collected and cited by counsel we find no case which can be said to sustain a claim made upon

> any such a state of facts. It is well understood that a meandered line is not regarded as a line of boundary. It is supposed to be along the shore of a body of water and to follow the windings of the stream or lake and the sinuosities of the banks. In such case, and where it appears that the Government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant to the water's edge. (*Kraut* v. *Crawford*, 18 Ia., 549.) *But no such condition is found under the evidence in the case at bar. There is not, and has not been, any body of water upon which to locate a meandered line.*

The court then quoted the rule in the Schurmeier case that a meandered line along a body of water is not a boundary, and continued (p. 225):

> We have cited this well-settled principle, not for the purpose of approving and following it—for it is known and understood everywhere to be the correct doctrine—but *to show that the meander line and the banks of a stream or shore of a lake can not be held to apply where there is no body of water to which it can be referred.* * * *
>
> We hold that all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title, except through the regular Government methods adopted by the General Government for the disposition of the public lands. The decree of the district court is affirmed.

This defines clearly the position of the Iowa supreme court on the question, and is cited by that court as

authority in the later case of *Rood* v. *Wallace* (109 Ia., 5, 9).

In *Shoemaker* v. *Hatch* (13 Nev., 261) the question arose whether an island in the Truckee River passed by disposal by the United States of the riparian land bordering the south channel, which is permanent in character, though the smaller of the two channels. The court (p. 266) held:

> * * * A glance at the map shows to a demonstration that the intention of the surveyor was to meander the southern channel, and not to include the land north of it in the subdivisions purchased by Haydon. To allow the claim of respondents would give them only about 2 acres of the west end of the island as a part of a fractional subdivision containing 10 or 15 acres, but by the same rule the owner of the next fractional subdivision on the east, which contains not more than 5 or 6 acres, would take as parcel of his purchase about 8 acres of the island.
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> * * * * *
>
> To determine whether a bar or island is part of the land on either side of a stream, account must be taken in every case of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel. It is a question of fact to be determined from all the surrounding circumstances, whether the land between the meander line and the shore of the

lake or water course is included in the survey. (See *Lammers* v. *Nissen*, 4 Neb., 251, and *Granger* v. *Swart*, 1 Woolworth's C. C. Rep., 90.) In this case we conclude from the facts proved and found by the court that the island in question was not included in the land surveyed on the south side of the south channel.

In *Fuller* v. *Shedd* (161 Ill., 462, 482), the court recognized the principle, though finding it not applicable to the case. It held:

> * * * If there is such mistake by the omission of lands in a survey between the meander line and the water, that the proportion to that sold is great, it may be corrected by a resurvey.
>
> * * * * *
>
> (P. 476.) There are cases where the meander line would be of itself the boundary, as where the line run by the Government surveyors by mistake or fraud in surveying the public lands leaves between such line and the stream or lake a considerable body of land on which is vegetation, etc., above the ordinary stage of water. In such case the surveyed land is all that is granted by the United States, and the patentee is not a riparian proprietor, his boundary being fixed by the meander line.

In *Barnhart* v. *Ehrhart* (33 Ore., 274; 54 Pac., 195), the question arose whether the meander line as run was, as plaintiff contended, along Wild Horse Creek, boundary of an Indian reservation, or was along a dry creek bed leaving about 152 acres unsurveyed public

land. Defendant asked the court to instruct the jury (p. 279) that if—

> * * * there existed at the time of the Government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of Wild Horse Creek covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots; and where such line in fact meanders the stream, under the laws of this State, the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint.

The court refused the request, and the supreme court, reversing the case (33 Oreg., 280), held:

> When *for any reason* the surveyor omits to include large tracts of land lying between the meander line as surveyed, or as pretended to have been run upon the ground, and such streams or bodies of water, the patents for the lots, *though referring to the official plat of such survey for identification*, are not equivalent to a conveyance of the premises to such navigable stream, lake, or bay, but are grants limited by such meander line [citing authorities]. Tested by this exception to the general rule applicable to the survey of public land, we think defendant was entitled to an instruction illustrative of his theory of the case; and this being so, inasmuch as the court did not embrace the subject in its general charge, it erred in refusing to give the first instruction requested.

The same principle is recognized and approved by the supreme court of North Dakota in *Heald* v. *Yumisko* (7 N. Dak., 422; 75 N. W., 806). The court (7 N. Dak., 426) said:

> Each case announces the principle that "in the surveys of the public lands of the United States the meander lines are generally considered as following the windings of streams; but the question whether they do so or not is a question of fact, to be determined by evidence *aliunde*." And in each case it was held that where the meander line did not in fact follow the shore line the fact that it was designated on the map as a meander line was not conclusive on the Government, and did not estop it from

> claiming the land between such pretended meander line and the shore line. We think those cases were correctly decided under their facts. * * *

In *Martin* v. *Carlin* (19 Wis., 454), the patentee of a fractional lot was held to an erroneous meander line as a boundary. The facts were, and the decision of the court was, that:

> (P. 454) It appears that there is a mistake in the original survey and meandering of Rock River, and that it is farther north and west than the Government survey had located it on the northeast fractional quarter, so that there is more land in the fractional quarter than the Government survey calls for. * * *
>
> (P. 458) Where the lines of a survey can be run from well ascertained and established monuments, they are to control and govern a description delineated on a plat. To adopt any other rule would annul the authority of the public surveys and open the door to litigation and difficulty.

The substance and general trend of the foregoing decisions upon cases arising under the system of Government surveys is that where a meander line along a stream or lake does not approximately follow the shore, or if no such body of water exists there, in such cases the meander line becomes a boundary.

This is the application to the system of Government surveys of an old and universal doctrine relating to surveys and conveyances, viz:

Monuments prevail over courses and distances, but

if a monument be false or irreconcilable, it is rejected, and the courses and distances control as boundaries to limit the tract conveyed or sold.

THE WISCONSIN RULE.

A modified and somewhat different, and indeed exceptional, rule has been adopted in Wisconsin. There the rule is that where the stream or lake does not exist at the point indicated, the lines will be extended until the water is reached, *or the fractional lot is full and regular*, but no farther.

The reasoning upon which this conclusion is reached is that the subdivisional lines of a section are statutory lines, and therefore have equal potency with the township and section lines. This consideration led that court, in *Whitney* v. *Detroit Lumber Company* (78 Wis., 240), to hold that if the indicated water boundary is not found within the lines of a fractional 40-acre subdivision, the tract can not be extended beyond its lines. This is followed in *Lally* v. *Rossman* (82 Wis., 147), and *Underwood* v. *Smith* (109 Wis., 334).

THE MINNESOTA RULE. SUPREME COURT OF THAT STATE APPLIES IT TO THIS CONTROVERSY.

In *Lamprey* v. *Mead* (14 Minn., 290) and *Olson* v. *Thorndike* (76 Id., 399), the supreme court of Minnesota referred to the Wisconsin case of *Whitney* v. *Detroit Lumber Company* (*supra*), and spoke of the rule there announced as a proper one under the facts of that case, but held it not applicable to the cases then under consideration.

Later, July 11, 1902, in *Security Land and Exploration Company* v. *Burns et al.*, and *same* v. *Weckey et al.* (91 N. W. Rep., 304, now pending on writ of error in this court, Nos. 431 and 432), the Minnesota court had before it actions of ejectment, at the suit of the Security Land and Improvement Company, against Burns and Weckey, to recover possession of what were claimed to be parts of lots 3, 5, 6, and 7, in section 4, township 157 north, range 17 west. The Security Land and Exploration Company held the patent title to said fractional lots under the Howe survey. The defendants, Burns and Weckey, were in possession of the lands lying between the meander line of said lots and the shore of Cedar Island Lake, claiming as settlers under the homestead laws. By reference to the maps (record, pp. 15, 22, and 71), it will be seen *the land there in controversy adjoined the west side of what is here claimed by appellees to be part of lot 8, in the same section 4.* The controlling questions involved were, therefore, identical with those in this case, and arose upon the same survey and involved lands in the same section 4 lying between the meander and lake lines. The Minnesota court made reference to its former decisions and those of this court following the rule in *Railroad Company* v. *Schurmeier* (7 Wall., 272), and held (91 N. W. Rep., 304, 306):

> * * * in those cases, as well as in the cases in this court to which we have referred, there was in fact a stream or lake to be meandered, and the shore line of the body of water and the meander line substantially coincided

except where tongues or points of land extended out into the body of water beyond the meander line, or the waters had receded; and the question was one of riparian rights strictly. No such questions are involved in this case, for the question here is as to the boundaries of the fractional lots owned by the plaintiffs. If in this case there was in fact, or ever had been, a lake upon which any part of the several fractional lots abutted, the general rule would apply, and their boundary would be the lake. But such is not this case, for there was in fact no lake at or within any reasonable distance of the meandered line or any part thereof, and never had been, to which the meander line might be found referable. * * * And, further, that, if the so-called meander line be accepted as a boundary line, it will give to the patentees or their grantees the full quantity of land bought and paid for by them, but, if they are permitted to extend their lot lines through the adjacent forest to the lake, they will obtain more than three times as much land as they purchased and paid for. In short, this is not a case where the surveyor, in running a meander line, has made a fair and honest attempt to follow the sinuosities of the shore line of an actual body of water, and by exclusion or inclusion of irregularities of contour has produced an average and approximately correct result, but one where the existence, at any time, of a lake upon which any part of the fractional lots in question could abut, is a pure fiction. Such being the case, it is not within the general rule as to meander

lines; for the far-away lake is an impossible boundary for all of the lots in question, and could never have been intended by the Government and the patentees as the boundary of the lots. The official plat was only intended to be a picture of the actual conditions on the ground; but the fraudulent mistake in the plat in this case was so gross that no man actually viewing the premises could possibly be misled, or believe that the shore line of the lake was intended as the boundary line of the lots. He would understand at once that the meander line as traced on the plat was the actual boundary line of the lots. This case, then, is one where the call for the natural monument, the lake, must be disregarded; for the admitted facts show that it is an impossible call, and that, if it is rejected, the courses and distances and the meander line will exactly close, and give to the plaintiff the precise quantity of land bought from the Government and paid for. It falls within the rule that a meander line is not, as a general proposition, a boundary line; yet the boundaries of fractional lots will not be indefinitely extended where they appear by the Government plat to abut on a body of water which in fact has never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits. (*Horne* v. *Smith*, 159 U. S., 40; 15 Sup. Ct., 988; 40 L. Ed., 68; *Niles* v. *Cedar Point*

Club, 175 U. S., 300; 20 Sup. Ct., 124; 44 L. Ed., 171; *Fuller* v. *Shedd*, 161 Ill., 462; 44 N. E., 286; 33 L. R. A., 146; 52 Am. St. Rep., 380; *Whitney* v. *Lumber Co.*, 78 Wis., 240; 47 N. W., 425; *Grant* v. *Hemphill*, 92 Iowa, 218; 59 N. W., 263; 60 N. W., 618; *Live Stock Co.* v. *Springer*, 35 Or., 312; 58 Pac., 102.)

> The last case cited was affirmed by the Supreme Court of the United States, and its decision in that case seems to conclusively establish the rule we have stated. * * * Our conclusion is that the trial court in this case was correct in holding that the boundary line of the plaintiff's lots was the line appearing on the Government plat as a meander line.

This clearly places the supreme court of Minnesota in harmony with the decisions of this court in Horne v. Smith and French-Glenn Live Stock Company, supra.

Even where the Federal statutes governing surveys do not apply, courts generally reject the call for natural monuments where the stream or lake does not exist in reasonable proximity to its designated place.

Courts seek to ascertain and effectuate the intention of the parties. If it appears that the call for a natural monument is a false or random one, the court rejects it. Hutchinson, Land Titles, section 529, lays down the rule that:

> Monuments are facts visibly indicating the extent of the land and the direction of the boundary lines. The courses or distances laid down in the deed or plat are merely descriptive of the facts. They are necessarily based upon

measurement, estimation, and calculation. Their accuracy depends upon the skill of the surveyor, and they may not be in accord with subsequent surveys. The monuments, however, actually found or placed upon the ground are always, as long as they exist, in the same direction and at the same distance from each other.

* * * * *

The controlling influence of a monument, natural or artificial, arises upon the supposition that it is more certain than course and distance. But, if in a given case it should prove less certain, the rule would fail, with the reason for it. Where the manifest intention of the parties requires the rejection of a call for one or more monuments in order to uphold the deed, the intent must prevail.

In *White et al.* v. *Luning* (93 U. S., 514, 524), the court held—

* * * It is true that, as a general rule, monuments, natural or artificial, referred to in a deed control on its construction rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance.

In *King* v. *Watkins* (98 Fed., 913, 924), the court held that—

> The rule that monuments prevail over course and distance does not apply to mistaken or false calls, as in a case like this, where the evidence conclusively shows that the surveyor was mistaken or ignorant of the location of the monuments called for, and of the local geography of the mountainous territory in which he was locating the survey. *Cattle Co.* v. *Thomson* (83 Tex., 169; 17 S. W., 920) is a case that received the approval of the court of appeals of Virginia in *Clarkston* v. *Iron Co.* (93 Va., 258; 24 S. E., 937). In that case the court said:
>
> "There are but two controlling questions in this case: (1) Whether the call for Devils River, made in the original surveys of Keuchler, should be extended so as to cross the river, or should yield to course and distance. (2) * * * Keuchler intended to place the surveys on Devils River, but in his attempt to do so he evidently mistook the true course of the river, and was misled by a dry canyon and the general course of the river as he found it when he established the southwestern corner of survey No. 26, in Block C of the surveys, and the northeast corner of No. 84, in Block I. It is true that the remaining surveys were not run upon the ground, but were platted in upon the map. They were platted in, however, from initial points fixed and clearly defined upon the ground. Keuchler may have intended to appropriate the land up to and across the river, but, as he did not know where the river actually was, no ran-

dom call therefor will control course and distance, when there is a clearly-defined starting point. It would be utterly at variance with all rules upon the subject to so hold. These surveys must be run out as platted in accordance with the field notes, the call for Devils River yielding to the calls for course and distance."

The calls for monuments relied on by defendants in the case at bar are clearly random calls, and the rule which holds that monuments must prevail over course and distance does not apply to such calls. To hold differently would give the rule an extension that has not received the sanction of any court, and that can not be sustained by the reasons given for its adoption.

In *Higginbotham* v. *Stoddard* (72 N. Y., 94, 99) the court held:

When there is anything in the description which shows that the courses and distances are right in themselves, they will prevail, because the primary object in all cases is to carry out the intention of the parties, as when it is apparent from the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances would include such quantity, and the description by monuments, more or less, the former should be followed.

In *Buffalo, etc., R. R.* v. *Stiegler* (61 N. Y., 350, 351) the court held that:

When it appears from the designation of quantity, or other elements of description, that the courses and distances from a fixed and de-

> termined line were intended to control monuments, then the latter should be disregarded. The intention of the parties, as evidenced by the deed, is, in all cases, to determine the location of the premises granted by it.

In *Davis* v. *Rainsford* (17 Mass., 207, 210), the court held:

> The only reason given, or which can be given, why monuments are to control the courses and distances in a deed is that the former are less liable to mistake.

In *French-Glenn Live Stock Co.* v. *Springer* (35 Oreg., 312, 321), affirmed in this court, *supra*, the State court held:

> If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of said lots; hence resort must be had to the secondary evidence, viz, the courses and distances which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a mathematical calculation would produce from the field notes of the survey of the fractional sections and the supposed meander line. * * * [p. 323.] If there was no lake to meander, the purchaser could not have bought upon the representation of the Government that there was.

In *Brookman* v. *Kurzman* (94 N. Y., 272, 276) it was held that the rule that a monument controls courses

and distances is not inflexible, but that the truth must be ascertained from all the facts. To the same effect are *Hostetter* v. *Ry. Co.* (108 Cal., 38), *Heaton* v. *Hodges* (14 Me., 66), *Murdock* v. *Chapman* (9 Gray, Mass., 156), *Johnson* v. *Simpson* (36 N. H., 91, 94), *Parkinson* v. *McQuaid* (54 Wis., 473, 478), *McCormick* v. *Huse* (78 Ill., 363, 373–374), *Mastin* v. *Olcott* (101 N. Y., 152, 158), *Johnson* v. *Archibald* (78 Tex., 96). Authorities on this head might be indefinitely multiplied, but these suffice to show the settled rule that the primary object of all courts in all cases is to effectuate the intent of the contracting parties. The courts differ only in the application of the rule.

Facts conclusively charge appellees with notice that meander was boundary.

If appellees or their grantors, the patentees, supposed from the plat that the lake bounded their lots, they had no authority to assume or believe that they would find it elsewhere than where thereby indicated. When they did not find it at the designated place, on their admitted examination of the ground, they thereby had notice that the plat had given them a false monument, and were thereby relegated to the other descriptions of the survey for location of the boundary. If the remaining descriptions would accurately describe the tracts purported to be sold and patented, all ambiguity would disappear, the location, boundary, and extent of the tracts be definitely fixed, and the true intent of the parties clearly appear. An actual view of the premises by the parties is presumed in all grants

(*Buffalo, &c., R. R. Co.* v. *Stiegler, supra*), and this is sometimes stated as a reason why monuments usually control course and distance. But appellees expressly admit their agents actually viewed the premises before their purchase, and the evidence shows those agents discovered that no surveyors' marks appeared, and that the lake was not near where the plat indicated; that is, that there was mistake or fraud in the survey.

Statutes governing public surveys must be considered in determining intent of public-land transactions.

In ascertaining the intent of the parties in entries of public lands the statute governing surveys of public lands is a part of the facts upon which the entries were made, and must be considered. That no survey was made is here another and an ascertained fact. Upon such facts no intent could have existed to sell or convey tracts so irregularly formed, in violation of the statute, as to border on the lake.

Area or quantity bears strongly upon intent.

Another fact indicative of intent is quantity, as by law the price to be paid is measured, and in homestead cases the amount that can be entered is limited, by area.

In the present case the area of the lots bounded by the meander line, and their area if extended to the lake, severally, is approximately as follows:

	Returned.		Extended.
Sec. 3, lot 1	25.40		100
2	49.38		160
Sec. 4, lot 1	56.00		
2	40.30		
3	50.87		
5	34.75	267.57	600
6	30.50		
7	25.25		
8	29.90		
Sec. 9, lot 1	39.90		110
2	25.75		120
3	45.00		69
4	43.45		65
Sec. 10, lot 1	42.50		100
2	25.50		80
3	31.31		130
	595.76		1,525

That the intent was to convey 1,525 acres upon a sale under a survey the calls of which indicate but 595 acres violates sound rules for construction of such contracts, where the sale is for quantity and the price is fixed wholly by area.

In *Horne* v. *Smith* (*supra*) this court (159 U. S., 43) said:

> In the first place, the area of the lots is given, and when that area is stated to be 170 acres it is obvious that no survey was *intended* of over 700 acres.

In *Grant* v. *Hemphill* (*supra*) the court (92 Ia., 224) said:

> If the section were not fractional, the plaintiff's claim would be a demand for a decree

> quieting title in him to more than 360 acres of land, based on the ground that he is the owner of 222 acres of land adjoining of which he is a riparian proprietor, and he makes this demand in a court of equity.

In *Bissell* v. *Fletcher* (*supra*) the court (19 Neb., 727) said:

> The contention of the plaintiff is that lot 3 extends to the river, and notwithstanding the fact that lot 3 contains all the land the plaintiff purchased and paid for, and the effect of the extension of the line would be to give him about 117 acres of land to which he seemed to have no equitable right, still he declares the land to be his.

In *Niles* v. *Cedar Point Club* (*supra*) the court (175 U. S., 306) said:

> The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of a surveyor more land was bought than was paid for, or than the Government was offering for sale.

In *McCormick* v. *Huse* (78 Ill., 363), one Holmes had entered the E. ½ NW. ¼, sec. 29, the patent being for 62.55 acres "according to the official plat of the survey of said lands returned to the General Land Office by the surveyor-general." The lands bordered upon a meandered bayou of the Illinois River, which crossed its north line. The holder of title under Holmes's

entry brought ejectment for the land in the E. ½ NW. ¼, sec. 29, north of the bayou. The court (78 Ill., 373–4) held:

> *The area* sold to him is noted on the plat of the fractional tract called for by his patent. The northwest quarter of 29 being made fractional by a navigable water course, the lines run upon the plat, *and the contents calculated*, must, under the act of Congress we have cited, confine him to the south of the bayou—there is no just pretense of a right to extend his lines across the bayou. * * * By the plat, field notes, entry and purchase he is limited to 62.55 acres, and the plat shows that is the exact quantity south of the bayou.
>
> It is claimed that quantity is not a reliable description. This court, in *McClintock* v. *Rogers* (11 Ill., 279), said, in construing a patent from the United States which describes the land granted by the number of the township, section, and range, the court would look to the plat and field notes made and returned to the surveyor-general by the Government surveyors in order to locate the land. Quantity, although the least reliable and the last to be resorted to of all descriptions in a grant or deed, in determining the boundaries of the premises granted, may sometimes be considered in corroboration of other evidence. Now where the plat is shown, and the number of acres within certain lines and boundaries is clearly specified, can there be more convincing evidence that a quantity specified must be found *within those lines and boundaries?* We think not. The area may be more

> or less on a new survey, but by the act of Congress, the area noted on the plat is to be taken for all practical purposes as the true area.

So in *Hostetter* v. *Ry. Co.* (108 Cal., 38) force is given to the area of land sold as indicating the intent of the parties and to interpret the calls and description of the land sold.

In any doubtful case the courts give weight to the fact that to follow the calls of the survey results in a gross excess, and hold that such fact is evidence of a mistake in the survey and that such mistake negatives an intent that monuments alone should be conclusive of intent.

ERROR IN DECISIONS OF COURTS BELOW.

The decision of the courts below, it is respectfully submitted, was based upon a misconstruction of the decisions in *Railroad Company* v. *Schurmeier* (7 Wall., 272), *Hardin* v. *Jordan* (140 U. S., 371), *Mitchell* v. *Smale* (140 U. S., 406), *McIver's Lessee* v. *Walker* (9 Cranch, 173), *Newsom* v. *Pryor* (7 Wheat., 7), *Craigen* v. *Powell* (128 U. S., 691), and *Jefferis* v. *East Omaha Land Co.* (134 U. S., 180).

In all these cases there had been an actual survey. The meander line, where bodies of water were encountered, had been actually run in good faith, approximately along the shore. The intent in every of the cases was to close the survey to the river or lake. In the Schurmeier case the disputed tract was a small sandbar, covered at high water. In the Hardin case, decided by a divided court, it does not appear that

any considerable body of land was excluded by the meander line, which ran across a narrow tongue of land extending into the lake. There had been a lowering of the water after the survey. The lake was nonnavigable, and the case was regarded as dependent upon the principles of riparian right. The suit was, in part, to recover possession of land covered by the water, the bed of the lake. The court (140 U. S., 272) said: "The main question in the cause is whether the title of the riparian owner on such a lake extends to the center of the lake or stops at the water's edge." The questions were obviously different from those governing the present one, and the decisions were but a restatement of that in the Schurmeier case. The controlling question was not, as here, merely one of boundary.

Cragin v. *Powell* (*supra*) was of different character and is not here applicable. A survey had been made according to which certain high and cultivable lands along a bayou were sold by the Government, and other lands, swamp and overflowed and unfit for cultivation, had passed to the State as swamp lands and had been sold by the State. The swamp-land grantee, claiming mistake in the survey, brought suit for settlement of boundary, obtained another survey and a decree so changing the location of his swamp land as to take the high land which the Government had sold. The court decided it as a question of jurisdiction, and held (128 U. S., 697) that:

> Whether the official survey made by Connelly is erroneous, or should give way to the

> extent of its discrepancies to the survey reported by McLeran, is a question which was not within the province of the court below, nor is it the province of this court to consider and determine. The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the Government. The correction of these mistakes and abuses has not been delegated to the judiciary, except as provided by the act of June 14, 1860 (12 Stat., 33, c. 128), in relation to Mexican land claims, which was repealed in 1864 (13 Stat., 322, c. 194, sec. 8). * * *

The case of *McIver's Lessee* v. *Walker* (*supra*) and that of *Newsom* v. *Pryor* (7 Wheat., 7) arose upon grants by the State of North Carolina, made before the cession to the United States of the territory now the State of Tennessee. The grants and surveys were made long prior to the Federal act for regular surveys of public lands, and are unaffected by the rules thereby imposed. These cases unqualifiedly hold that a call for a natural object in the patent or plat therein referred to controls both course and distance. In Newsom's case the patent was for land "lying on both sides of the two main forks of Duck River." These words controlled the location of the land. There was no false call for a natural object or monument. McIver's case was similar, as the patent made reference to "the plat hereto annexed," which showed Crow Creek running through the land. The survey was not a United States statutory survey and the grants were not made under

the United States public land laws. The facts so distinguish these cases from the present one as to make the decisions not applicable as precedents controlling here.

The case of *Jefferis* v. *East Omaha Land Company* (134 U. S., 178), cited by appellees, was one involving riparian rights to accretion. The land was surveyed in 1851. There was an actual survey and meander of the river. Fractional lot 4 then contained 37.24 acres. October, 1853, Jefferis purchased the lot from the Government. It affirmatively appeared (p. 180) that:

> At the time of the entry the meander line of the left bank of the river was the same, or nearly the same, as shown by such field notes and plat.

There had been no appreciable accretion to the lot. Subsequently there formed, between 1853 and 1870, "so slowly that it could not be observed in its progress," an additional forty acres of land. In 1856 Jefferis conveyed the tract by its surveyed description, and this title by mesne conveyances came to the East Omaha Land Company. In 1888 Counzeman, without any entry from the Government or grant by any one, entered upon and occupied the accretion land, and afterwards by quitclaim deed conveyed it to Jefferis. The land company brought suit to quiet its title. The court held that the accretion belonged to lot 4, upon which it formed as a part thereof, and title thereto passed by the several mesne conveyances to the East Omaha Land Company and quieted its title. The case

has no bearing here. It involved only riparian right to accretion.

These cases are plainly distinguishable from *Horne* v. *Smith*, *French-Glenn Live Stock Co.* v. *Springer*, *Granger* v. *Swart*, and others above cited therewith. Justice Miller, who delivered the opinion in *Granger* v. *Swart* (*supra*), concurred in the opinion in *Railroad Company* v. *Schurmeier*. In *Horne* v. *Smith* the court cites with evident approval the State decisions in *Lammers* v. *Nissen*, *Glenn* v. *Jeffrey*, *Whitney* v. *Detroit Lumber Company*, and *Lally* v. *Rossman*, so that the court did not deem them inharmonious with its decisions in *Railroad Company* v. *Schurmeier* and *Hardin* v. *Jordan*. At the same term of court with *Horne* v. *Smith*, the court decided *Grand Rapids and Indiana R'd Co.* v. *Butler* (159 U. S, 87), therein calling attention to the former case as instructive, and on wholly different facts, and citing *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, distinguishing them.

It thus is apparent that none of these decisions are in conflict with the decisions of this court relied upon by appellants in support of their contentions, and as the present case must be controlled by the laws of the United States for disposal of the public domain, as they are construed by the Federal courts, a further review of the cases cited by appellees under this head is unnecessary.

NO EQUITY IS SHOWN IN THE BILL.

The case is even weaker in its equitable than in its legal aspect. If complainants' legal right to a bound-

ary upon the lake be conceded, for the purposes of argument, no ground exists for equitable relief. If complainants own the lands in question (1) they have adequate remedy at law; (2) no impending, irreparable injury is shown; (3) or threat of repeated trespass; (4) the facts do not present a case for interposition of equity to avoid a multiplicity of suits; (5) there is a defect of parties to bill regarded as bill of peace; (6) complainants had notice of the fraud against the consequences of which they seek relief; (7) the suit is essentially against the Government for specific performance of a false representation made by the plat, and will not lie, because the Government has not consented to be sued in such form of action; but were it otherwise, equity will not, in appellees' behalf, grant relief by establishing a boundary, and so recognize and sanction a claim devoid of equity, which it would cancel in a suit by the Government; (8) and finally, it necessarily involves questions of administration, with which the courts will not interfere.

If appellees own these lands, they have ample remedy at law.

Their claim is that, by force of the patents based upon a fictitious survey and false plat, their fractional lots must be extended to border upon the lake. There is no equitable right to the large excess of land claimed, which they never purchased and the Government never sold. If the boundary of their land is the shore of Cedar Island Lake, that is purely a legal right, arising from the facts. But it is a fundamental

doctrine that it is not the province of a court of equity to determine or establish purely legal rights.

Section 723 of the Revised Statutes declares that:

> Suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.

In *New York, etc. Co.* v. *Memphis Water Co.* (107 U. S., 205, 214), the court say:

> This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts.

In *Whitehead* v. *Shattuck* (138 U. S., 146), quoting from its decision in *Buzard* v. *Houston* (119 U. S., 351), the court held (p. 151) that:

> Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

The rule is jurisdictional to relief in equity, and enforced in repeated decisions. It is enforced by the court *sua sponte*, though not raised by the pleadings or briefs of counsel. *Hayward* v. *Andrews* (106 U. S., 672); *Parker* v. *Winnipiseogee, &c., Co.* (2 Black, 545); *Fassett* v. *Gregg* (113 U. S., 551); *Smith* v. *Bourbon Co.* (127 U. S., 105, 111); *Russell* v. *Clarke's Exr.* (7

Cranch, 69, 89); *Dows* v. *Chicago* (11 Wall., 108, 112), and numerous other decisions.

Nor is there jurisdiction from impending irreparable injury.

The fear, or liability to irreparable injury, is but a flimsy pretext, conclusively negatived by the evidence in the record. The township had been resurveyed by Patton in 1893 under authority of the county board (record, p. 144); some surveys had also been made by Cook (record, p. 145). Croswell, the defendant (record, p. 191) had made surveys in the township, locating the actual meanders of the lake, and testified (record, p. 195) that a survey could be made by him "without any material injury to the soil or timber;" that he (record, p. 200) "wouldn't have to cut very much valuable timber." Surveys had been made, and were being made, during the pendency of the suit, at the instance and with consent of both parties, by which the maps were prepared. The allegation and claim of fear of irreparable injury was but a pretense upon which to found a claim. If appellees' claim of ownership were well founded, the proposed survey would be but a casual trespass, occasioning no irreparable injury. Facts must be distinctly averred, which show that apprehension of irreparable injury is well founded. As held in *Russell* v. *Clarke's Exrs.* (7 Cr., 69, 89), a rule of chancery jurisdiction "can not be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity."

It was held in *Cruickshank* v. *Bidwell* (176 U. S., 73, 81), that—

> The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result.

In *Watson* v. *Sutherland* (5 Wall., 74, 79), the court held that—

> The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings.

Goodell v. *Lassen* (69 Ill., 145, 147); *McHenry* v. *Jewett* (9 N. Y., 58, 62); *Branch Tpk. Co.* v. *Supervisors of Yuba Co.* (13 Cal., 190); *Jerome et al.*, v. *Ross* (7 Johns., Ch. 315, 336); *Spofford* v. *B. & B. R. R. Company* (66 Me., 51, 53).

Nor can this suit be maintained upon the ground of threatened trespass.

In *Citizens' Coach Company* v. *Camden, etc., Company* (29 N. J. Eq., 299, 303), the court held that an injunction—

> is the strong arm of equity, that never ought to be extended unless in cases of great injury, where the courts of law can not afford an adequate or commensurate remedy in damages. The court always, to restrain a trespasser, expects a strong case of destruction or irreparable mischief to be made out, or that the trespass should be continued so long as to become a nuisance.

In *Litchfield* v. *Register and Receiver* (9 Wall., 575) the plaintiff claimed, as appellees do here, that he was owner of the lands which those officers were offering as public lands, and asked an injunction restraining them from so doing. The court denied the writ, holding that remedy existed at law, after issue of patent, and that administration by the executive department would not be interfered with by the courts. The court (9 Wall., 578) held:

> After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right.

The decision in *Noble* v. *Union River, &c., Co.* (147 U. S., 165), cited by appellees, is not in conflict with the principle so announced. In that case there was no remaining administrative question as to the surveys, boundary, or right to the lands involved. Every question had been finally determined, so far as the land department was concerned, and its authority terminated. The acts had been done which under the law vested in the railway company the right of property in its right of way. The act restrained was an attempt of the Land Department to resume jurisdiction of a matter in respect to which it had become *functus*

officio. The court limits that decision in the subsequent case of *Cruickshank* v. *Bidwell* (*supra*), saying (176 U. S., 80):

> The Government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. And it appeared that the only remedy was through equity interposition. But we are unwilling to extend that precedent.

Nor is there in this case jurisdiction in equity to avoid a multiplicity of suits.

A bill of peace will not lie against independent trespassers. (Adams Eq., 200, 6th Am. ed., 408.) The jurisdiction of equity to prevent a multiplicity of suits is not of itself and alone an independent source or ground of jurisdiction, and will not create a jurisdiction in equity, where there is not a prior existing cause of action. (Pomeroy Eq., secs. 250 and 181.) The rule is stated by Judge Story (Story's Eq., sec. 856,), that:

> The danger of judicial proceedings is not an injury justifying judicial proceedings. To entitle a party to maintain a bill of peace, it must be clear that there is a right claimed which affects many persons, and that a suitable number of parties in interest are before the court, for if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, for it can not conclude any persons but the very defendants.

There is a defect of parties to the bill regarded as a bill of peace.

It appears by the bill (record, p. 10) that five certain persons named, in 1892, settled upon and occupied these lands, "claiming the same to be unsurveyed unoccupied Government lands, and they still occupy the same," and that they petitioned for the survey, claiming to be citizens of the United States "entitled respectively to enter the unappropriated public land of the United States," and that they have improved them. It thus appears that these persons have made settlements upon these lands as public lands, and have therein acquired rights of entry when they are surveyed and opened to settlement entry. But those persons are not made parties to the bill. In a like case (*Litchfield* v. *Register and Receiver*, 9 Wall., 575, 578), the court held:

> It appears on its face that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected and whose claim of right is adverse to plaintiff. If the court should hear the case and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have

no such duty to perform. They might let the injunction be issued without defense, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court.

The court held in *Craig* v. *Lietensdorf* (123 U. S., 189, 207) that a decree on such a bill could operate only "*in personam* and *inter partes*, nowise affecting the rights of those not parties to the suit." To the same effect are *Pope et al.* v. *Melrose et al.* (2 A. K. Marsh, Ky., 239, 240); *Wolfe et al.* v. *Burke et al.* (56 N. Y., 115, 120); *Poyer* v. *Desplaines* (123 Ill., 111, 117-118). This should alone be decisive of the present case, that the bill can not be sustained. The complainants can not under the guise of a bill of peace bar the rights of these persons, not parties, and who have not been heard. The decree could not conclude them, but their rights would remain unadjudicated and without remedy. They are not numerous, and are asserting independent rights to separate tracts entirely capable of settlement in proceedings at law and by legal remedies.

It was held in *Fellows* v. *Spaulding* (141 Mass., 89, 93) that a bill of peace is addressed to the sound discretion of the court, and will not be entertained unless it appears that there is a practical necessity for the court to prevent vexatious litigation. The bill, on the contrary, discloses that the parties are not numerous; that

if complainants have legal title, they also have complete legal remedy, and that the adverse rights asserted are separate and distinct and not common. Such facts are fatal to the bill. *Hopgood* v. *Hewitt* (119 U. S., 227, 234); *Grand Chute* v. *Winegar* (15 Wall., 355, 372).

Appellees have not shown, and under the established facts could not have shown, that their purchase was without notice of the fraud against the consequences of which they seek relief, and was in reasonable reliance upon the representation of the survey and plat that the fractional lots bordered upon the lake.

The circuit court's findings numbered 2, 3, 4, 8, and 9, when taken together, unmistakably show that appellees purchased with notice that the land in controversy was never in fact surveyed, and that Howe's meander line so far departed from the shore line that it could not be reasonably regarded as an approximation of the latter. Appellees were not misled. In law they could not, and of course they did not, shut their eyes to the incontrovertible evidence borne upon the face of the land in controversy at the time of their purchase, as well as before and since, that the meander line did not even approximate a fair or honest effort to follow the shore. They could not have understood that they were getting the land here in controversy.

The tracts were examined by appellees' agents before their purchase. Flinn testified (record, pp. 82 and 105): "We had no knowledge whatever of any fraud or anything of that kind in connection with this survey." Murphy testified (record, pp. 85 and 108):

> I relied upon the plats and Government descriptions that they were bounded by the lake.

> I bought and paid for the timber, which was estimated up to the lake shore. * * *
>
> I took the report and examination of my woodsmen, relying on the Government plat that the lands were bounded by the lake. * * *

The testimony of Robinson (record, pp. 110, 112) and Dorr (record, p. 130) is less clear upon this point. They all testify that the estimates of timber were made for them by their agent, Eveleth, who went over the ground. He testified (record, p. 118) that he knew when he looked at the land that the fractions north of the lake were larger than they appeared to be on the plat, but (record, p. 119) he did not report it; that he took a compass and plat with him, and understands running lines and finding corners (record, p. 120). *He failed to find any lines or corners interior to the township*, and started from corners found on the north township line (record, p. 121). "It was three-fourths of a mile," or "a little over that," from the corner of sections 3 and 4 on the township line to the lake (the distance should have been about 27 rods, and was 240 or more). (Record, pp. 122 and 127.) He found no marks whatever (record, p. 123), "*practically there was no meanders to it*" (record, 123). "*There were no traces of any Government survey*," *interior to the township lines.* (Record, p. 127.) "*I concluded the Government was not very strict in making their acceptance of surveys.*" "*It would show me that corners had not been established.*" (Record, p. 127.) He looked for quarter posts, but "*there was no line established;* we looked where we thought a line should be and didn't find them nor any

markings north of the lake, except section corners on the town line." (Record, p. 128.) No acreage was marked by the land officers on the plats furnished him; as a rule he did not ask for acreage unless it was for a piece he expected to make a survey on.

This is all the testimony as to knowledge of the appellees and their estimator of fraud or mistake in the survey. It is, however, stipulated (record, p. 103):

> 7. prior to the purchase by complainants, or by any of them, of any of the lands surrounding said lake as platted, in sections two (2), three (3), four (4), nine (9), ten (10), and eleven (11), in said township fifty-seven (57), said lands were at their instance and in their behalf examined by experienced and competent woodsmen, and the general and riparian character thereof ascertained, and the quantity of timber thereon estimated and reported by such woodsmen to said complainants before they purchased said lands.
>
> 8. Said woodsmen, and all land lookers and estimators, were, and are, accustomed to locate, survey, and examine public lands and timber lands by reference to, and by the aid and direction of, the purported Government plats relating to such lands, *and of the section and other posts, lines, and markings established by the Government surveyor upon such lands; but when said lands were so examined* as aforesaid, and when the complainants, and each of them, acquired the interests in the respective tracts of land surrounding said lake now claimed by them, respectively, *it was impossible to locate any Government subdivision in said*

township, except by measurement from the exterior lines of said township, *by reason of the entire absence of interior lines or markings, and of corner and quarter posts;* and at the time said lands were originally entered in the Government Land Office *location thereof*, except as aforesaid, *was likewise impossible.*

But complainants do not, by the stipulations of this paragraph, admit that they had any actual knowledge of the facts therein stated at the time they acquired said lands.

It thus clearly appears that no evidences existed on the ground interior to the township that any survey had been made, although the surveyors' markings were easily found on the township line made at and about the same time as those within the township should have been made The estimator knew the lots were unusually large and that the excess of land was covered by timber trees that will not grow in water; that the banks of the lake were high, sloping, agricultural land, instead of low and swampy, and that the outlet was not in section 11, as indicated, but was near the southwest corner of section 2; and that a large area, 1,000 to 1,200 acres of land, lay between the platted meander line and the actual lake.

In view of such facts, resting upon admissions and testimony produced by appellants, it can not be reasonably contended that they had not knowledge and were not chargeable with knowledge of fraud or mistake in the survey.

The matter was patent. Appellees were bound to know the law regulating surveys of public lands.

They went upon and examined the lands. No surveyors' marks were there. The distances to the lake greatly exceeded that shown by the survey and those fixed by law for governmental subdivisions of land. No water body lay near the purported meander. They were thereby put upon their inquiry. They could not be deceived, for they had no right to rely upon the survey. On this head, Pomeroy's Equity, second edition (secs. 892 and 894), says:

> 892. * * * As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is, justified in relying upon the statements which are offered as inducements for him to enter upon certain conduct. 1. When, before entering into the contract or other transaction, *he actually resorts to the proper means of ascertaining the truth and verifying the statement.* 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possesed by both parties. * * *
>
> 894. * * * If, in a contract of sale or of leasing, representations are made by the vendor concerning *some incidents*, qualities, or attributes of the subject-matter *which are open and visible,*

> *so that the falsity of the statement is patent to any ordinary observer, and it is made to appear that the purchaser, at or shortly before the concluding the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party.* * * * This special rule concerning patent defects requires that the thing concerning which the statements are made should be seen or otherwise personally known by the purchaser, and that the defects should be plainly open and patent to any ordinary observer, and especially that no means should be used to conceal them, or to divert the buyer's attention from them, or in any way to prevent a fair inquiry.

Appellees purchased under homestead entrymen, and the law of the entry was itself notice. By Exhibits F and I (record, pp. 257, 262) the source of title to lots 1, section 3, 8, section 4, and 4, section 9, was a homestead entry by Petrie, and purported to comprise 95 acres. The law limited the entry to 160 acres. (See sections 2289, 2304, and 2306 Rev. Stat.) The appellees could not expect thereby to obtain title to 270 acres, as now contended and as now results if those lots as lying on the face of the earth ran to the lake and included the land between the meander line and the water. So also the source of title to lots 2, in section 3, and 1, in section 4, was a homestead entry by Koechler, limited to 160 acres, and purported to comprise 105 acres. The appellees could not expect thereby to acquire 350 acres, as contended and as now results if these lots as lying on the face of the earth ran to the

lake. Nor could the patentees honestly acquire such area of land by their homestead entries, limited by law to 160 acres each.

The appellees by purchase took only what the patentees acquired. No question of the appellees' good faith is involved. Their knowledge or lack of knowledge of the fraud can not restrict or extend the actual grant made by the Government under its patents. However, neither the appellees nor their grantors could be *bona fide* purchasers in the sense that they were without notice of the fraudulent character of the survey, or in reasonable belief that such fractional lots extend to the border of the lake. The actually observed lack of evidences of survey, blazed trees, or established corners, and the excess of area, were notice that the survey terminated at the meander line; that such line was the boundary of the lots, and that the land beyond that was unsurveyed. There were patent physical evidences that no lake ever existed at approximately the place of the meander line.

Suit is essentially one against United States to which it has not assented. Equity will not in appellees' behalf grant affirmative relief by establishing a boundary and so recognize and sanction a claim which it would cancel in a suit by the Government and thereby establish an inequitable demand.

The suit is essentially and in substance one against the Government for specific performance of the representation made by the plat. It is a suit in equity, and must be governed by equitable principles. The Government has not consented to be sued in such manner. (*United States* v. *Schurtz*, 102 U. S., 378, 404.) If it

can not be sued in such form directly that relief can not be given indirectly in substance and effect, under the guise of an injunction against a trespass, or a survey, in a suit against subordinate officers.

But, for argument, passing this fatal objection to the proceeding, Howe was a subordinate officer, acting under specific statutory instructions, and his representation, outside of his authority and in violation of his instructions, do not bind the Government, as held by the court in *Whiteside* v. *United States* (*supra*), and in *Moffat* v. *United States* (*supra*).

But were the law otherwise, the court would not, in equity, decree a specific performance. Among the essentials to compelling the specific performance of a contract given by Pomeroy's Equity (2d ed., sec. 1405) are that—

> * * * It must be, in general, mutual in its obligation and in its remedy. *The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake, or illegality.* * * * The *contract must be perfectly fair, equal, and just* in its terms and in its circumstances. The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive.

Again, the same author, section 860, says:

> * * * The equitable remedy of the specific enforcement of contracts, even when they are valid and binding at law, is not a matter of course; it is so completely governed by equitable considerations that it is sometimes, though improperly, called discretionary; *it is never*

granted unless it is entirely in accordance with equity and good conscience. It is therefore a well-settled rule that in suits for the specific enforcement of agreements, even when written, the defendant may by means of parol evidence show that, *through the mistake of both or either of the parties*, the writing does not express the real agreement, or that the agreement itself was entered into *through a mistake as to its subject-matter or as to its terms.* In short, *a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood.* What is thus true of mistake is equally true of a defense based upon fraud or surprise. Wherever the defendant's mistake was, either intentionally or not, induced, or made probable or even possible, by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such error prevents a specific enforcement of the agreement. Such cooperation by the plaintiff, however, is not at all essential. *A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proved in defense, and may defeat a specific performance.* This is indeed the very essence of the equitable theory concerning the nature and effect of mistake. * * *

Under circumstances like these a private party would not be decreed specifically to perform the representation of a plat so admittedly a mistake or fraud. So much more, were a suit for that purpose against the

Government permissible, a decree would not be rendered against it. The courts can not decree the correction of a survey. (*Cragin* v. *Powell*, 128 U. S., 691, 697.) Much less can they decree a survey never made, and which, if made, violates a statute. The sales of public lands are based upon the area at a price per acre, and no court of equity would compel a private party upon a contract for sale of five hundred and ninety-five acres, for a consideration measured by the acre, to convey fifteen hundred and twenty-five acres because of an error of the plat showing a false meander of a lake.

The suit necessarily involves questions of administration belonging to the Executive Department of Government with which the courts, either of law or equity, will not interfere.

In administering the public land laws the officers of the Land Department, as subordinate agents of the Secretary of the Interior as head of the Department, must necessarily consider and determine what are public lands, what lands have been surveyed, and what are to be surveyed; what lands have been disposed of, what remain to be disposed of, and what are reserved. The courts will not interfere with an executive officer where discretion and judgment are to be exercised, either by mandamus (*Gaines* v. *Thompson*, 7 Wall., 347, 453; *Secretary* v. *McGarrahan*, 9 Wall., 298, 312), or by injunction (*Brown* v. *Hitchcock*, 173 U. S., 473, 477; *Litchfield* v. *Register and Receiver*, 9 Wall., 575, 577). It is only when the Executive Department has finally acted on the matter and attempts to resume a jurisdic-

tion that is *functus officio* that the court will interfere by injunction. *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165); and of that case the court in *Cruickshank* v. *Bidwell* (176 U. S., 73, 80), said:

> The jurisdiction was sustained, but the Government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. *And it appeared that the only remedy was through equity interposition.* * * * *But we are unwilling to extend that precedent.*

As above shown, ample remedy exists at law if appellees' patents grant the lands in question, and no necessity exists for interposition of equity or for extension of that precedent.

Appellees participated in the proceedings before the Land Department leading up to the order for survey, and are thereby concluded as to all questions of fact and as to all further administrative proceedings of the Land Department.

The officers of the Land Department are by law made a special tribunal for administration of the public lands, and their jurisdiction is exclusive, and will not be interfered with by the courts. In *Litchfield* v. *Register and Receiver* (9 Wall., 575, 577) the court held:

> The principle has been so repeatedly decided in this court that the judiciary can not interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial,

and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. * * *

The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. * * * Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. * * * This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. * * *

It appears on its face that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected and whose claim of right

> is adverse to plaintiff. If the court should hear the case and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defense, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court.

The authority thus conferred carries with it the right to conclude the parties before it for all purposes of the completion of its administrative duties. The Land Department is charged with the survey of the public domain, and must therefore primarily determine what are public lands subject to survey and disposal under the public-land laws. The parties were heard and the matter was decided by the Secretary of the Interior October 29, 1896 (Record, p. 51), and is reported in 20 Land Decisions, 28, and 23 Land Decisions, 430. Such decision, like that of any other tribunal, must be conclusive upon the parties until by a direct proceeding it can be brought to a proper court for review.

To say that such decision can be brought collaterally in question, and that the matter can be taken from the jurisdiction of the Land Department to the courts before the Land Department has taken final action, is violative of every principle of the jurisdiction of special or inferior tribunals, and of the finality and conclusiveness of their adjudications.

In *Brown* v. *Hitchcock* (173 U. S., 473, 477), it is held:

> As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such Departments and carried into the courts; those Departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

In *Quinby* v. *Conlan* (104 U. S., 420, 426), the Supreme Court said:

> It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied the parties rights which, upon a correct construction, would have been conceded

> to them, or where misrepresentations and fraud have been practiced necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action.

And again, the same court, in *Steel* v. *Smelting Company* (106 U. S., 447, 450), said:

> We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

It is respectfully submitted that there is no precedent for the course taken by appellees, and that a suit of this kind can not be maintained.

If the Land Department errs in its construction of the law and grants a patent to the wrong party, such error can be reviewed in the proper action. But until it has so acted, its proceedings are not subject to judicial control. It is therefore contended that as appellees appeared in the proceedings for ordering the survey, and were fully heard, they are for all administrative proceedings of the Land Department concluded, and can not invoke the aid of the judicial tribunals by any suit in law or equity, until the Land Department may have issued patent for the land, when the aid of the courts may be invoked, in a proceeding against adverse claimants, for title to the lands claimed.

The decree is erroneous, because:

First. The lands in question are unsurveyed public lands, and as such not subject to disposal.

Second. The Government is not bound by the false and frauduleut representation of its subordinate officer, the surveyor, that a survey had been made.

Third. The statute regulating surveys of public lands in fixed square subdivisions, together with the entire absence of all marks and evidences of survey, was notice that no survey had been made.

Fourth. The field notes, and features of the ground totally irreconcilable therewith, and the fact that no lake or body of water was at or near the indicated meander line, was notice and evidence that no survey was made, and that the survey did not extend to the lake, and was not intended to extend to the lake, and that the lake must be rejected as a false call of the sur-

vey, and the tracts sold must terminate at and be bounded by the meander line.

Fifth. There is no equity in the bill in that: (1) appellees have adequate remedy at law; (2) no impending, irreparable injury is shown; (3) nor any continuing trespass or nuisance; (4) nor multiplicity of suits to be prevented; (5) there are no proper parties to the bill regarded as a bill of peace; (6) appellees are chargeable with notice of the fraudulent survey; (7) the action is substantially one against the Government for specific performance, and the Government is not concluded by the fraud of its subordinate officer making the fraudulent return of survey; (8) the suit is subversive of executive administration.

Sixth. The appellees are for all administrative purposes concluded by participation in the proceedings before the land department.

The decree should, therefore, be reversed, and the bill dismissed.

Respectfully submitted.

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